NO.: NNH-CV-14-6050848-S

ZHAOYIN WANG,	**:**	**SUPERIOR COURT**
Plaintiff,	**:**	
	:	
v.	**:**	**J.D. OF NEW HAVEN**
	:	**AT NEW HAVEN**
BETA PHARMA, INC., DON ZHANG AND	**:**	
ZHEJIANG BETA PHARMA CO., LTD.,	**:**	
Defendants.	**:**	**DECEMBER 17, 2015**

DEFENDANTS BETA PHARMA, INC. AND DON ZHANG'S REPLY BRIEF IN FURTHER SUPPORT OF MOTION TO STRIKE

Defendants Beta Pharma, Inc. ("Beta Pharma") and Don Zhang ("Zhang") (collectively "Defendants") file this Reply Brief in further support of their Motion to Strike [D.E. # 178.00], which is directed to the Third through Eighth Counts of plaintiff Zhaoyin Wang's Complaint, and in response to arguments made in Plaintiff's Objection to Motion to Strike (the "Objection" or "Obj.") [D.E. # 180.00]. The Court should grant this Motion because, in violation of the economic loss doctrine, Plaintiff recasts his contract-based claims as "torts," and because Plaintiff fails to state cognizable causes of action for negligent misrepresentation based on nondisclosures, fraudulent misrepresentation, or breach of fiduciary duty.

This action is entirely about a contract: the alleged "Partnership Agreement" that is attached to the Complaint as Exhibit A. Plaintiff brought breach of contract claims, but he also re-pled those contractual claims as torts – negligent misrepresentation, fraudulent misrepresentation, and breach of fiduciary duty. Defendants explained, in

the Memorandum in Support of this Motion[1] that the economic loss doctrine bars this attempt to take multiple bites of the apple through both contract-based claims and "tort" claims. Plaintiff now argues that the economic loss doctrine does not apply because the alleged misrepresentations induced Plaintiff to enter the agreement at issue. However, the allegations pled provide no support whatsoever for Plaintiff's inducement theory.

Next, Plaintiff tries to save his negligent misrepresentation claims from dismissal by arguing that Defendants had duties to disclose certain information to Plaintiff, but did not make those disclosures. Plaintiff's own Complaint belies this argument. Duties to provide information would arise if Defendants disclosed information on the topics of the alleged nondisclosures. Plaintiff fails to plead that Defendants made any representations on the topics of the nondisclosures.

Plaintiff similarly fails to plead claims for fraudulent misrepresentation and breach of fiduciary duty. Regarding the former, his Complaint fails to allege that Defendants knew the alleged representations were false. Regarding the latter, Plaintiff's Complaint states no agency relationship between the parties. The only alleged relationship between the parties is as parties on the opposite sides of a transaction, an association that does not give rise to fiduciary duties.

For the reasons set forth herein, and for the reasons provided in the Memorandum in Support, Defendants respectfully request that the Court grant this Motion to Strike.

[1] Defendants' Memorandum in Support of this Motion is referred to herein as the "Memorandum in Support" or "Supp. Memo."

I. The Economic Loss Doctrine Bars Plaintiff's Tort Claims

The Economic Loss Doctrine ("ELD") bars Plaintiff's "tort" counts because they arise out of alleged breaches of contract that produced only economic losses. Supp. Memo. at 7-13. Plaintiff attempts to save these duplicative counts from dismissal by arguing that the tort counts are based on misrepresentations and omissions made to Plaintiff before the parties entered into the subject Partnership Agreement (the "Agreement") in order to induce him to form a business relationship with Defendants. Obj. at 5-6. This argument fails.

As a preliminary matter, the Court must ignore new statements of fact that Plaintiff makes, for the first time, in his Objection. Recognizing that the counts as pled have no legal basis, Plaintiff refers to new facts not pled in the Complaint. Obj. at 6 n. 2 ("Evidence will show that . . . defendants' false representations and nondisclosures occurred during the negotiation process.") (emphasis added); Id. at 7 n. 3 ("evidence here will show that defendants did not disclose to plaintiff that Beta Pharma was selling ZBP shares, but Don Zhang, individually, was receiving the sale proceeds.") (emphasis added). It is black letter Connecticut law that "[i]n ruling on a motion to strike, the court is limited to the facts alleged in the complaint." Faulkner v. United Techs. Corp., 240 Conn. 576, 580 (1997). Accordingly, this Court may not consider Plaintiff's statements about facts that "evidence will show," but that are not alleged in the Complaint.

Plaintiff justifies his inclusion of these statements by noting that Practice Book § 10-1 prohibits a party from pleading evidence, apparently meaning that he could not have placed those statements in the Complaint because they are evidence. If the statements in question are "evidence," then under Section 10-1, they are not properly

part of the pleadings, and the Court may not consider them in ruling on the Motion to Strike. Faulkner, 240 Conn. at 580. Turning to the "tort" allegations, it is clear that those counts amount to duplicative, contract-based claims that are barred by the ELD.

A. The Economic Loss Doctrine Bars Plaintiff's Claims of Negligent and Fraudulent Misrepresentation

The ELD bars Plaintiff's negligent and fraudulent misrepresentation claims, and Plaintiff cannot avoid dismissal by arguing that the representations induced Plaintiff to enter the Agreement. In the Third and Fourth Counts, Plaintiff makes claims for negligent and fraudulent misrepresentation, respectively, against Beta Pharma. In the Sixth and Seventh Counts, he makes the same claims against Zhang. Defendants have explained that the ELD bars these claims because the allegations supporting them track those that support the contract claims. Supp. Memo. at 10-13. Plaintiff now unavailingly argues that those claims are insulated from the ELD because Defendants made representations to him before he entered into the Agreement, and the representations were made to induce him to enter the Agreement. Obj. at 6-18. For multiple reasons, this argument it meritless.

First, Plaintiff's Opposition improperly relies on new allegations that were not part of the Complaint. In the Complaint, Plaintiff alleged that Defendants made misrepresentations, but Plaintiff failed to allege that any of these representations occurred before the signing of the Agreement, or that they were made to induce him to enter the Agreement. Plaintiff makes those new inducement allegations for the first time in his Objection. Since a court may not consider factual allegations made in a brief when ruling on a motion to strike, In re Nicholas O., 2015 WL 4755470, *3 n. 9 (Conn.

Super. Ct. June 26, 2015), the Court must disregard these new assertions about the alleged representations.

Second, there is no support in the Complaint for Plaintiff's inducement argument. The Complaint alleges that Plaintiff relied on the alleged representations in taking a set of specific actions. See, e.g., Comp., Third Count ¶ 14. However, Plaintiff fails to allege (even in conclusory form) that the representations were made to induce him to enter the Agreement. Furthermore, the set of specific actions that Plaintiff allegedly took in reliance on the representations – such as forming Beta Pharma Canada, investing money into that company, working for that company, etc. – did not include entering into the Agreement, and all occurred after the parties allegedly entered into the Agreement. Id. Accordingly, Plaintiff's inducement argument does not hold water.

Third, there is no support in the Complaint for Plaintiff's temporal argument – that the alleged misrepresentations occurred before the parties entered into the Agreement. Plaintiff's Complaint alleged that either Beta Pharma or Zhang "made …[certain enumerated] representations to plaintiff," see, e.g., Comp., Third Count ¶ 11, and then summarily claimed that Beta Pharma knew or should have known that the representations were false. Id. ¶ 12. However, the Complaint lacks any allegations that, taken as true, would show that the representations were made before the parties entered into the Agreement. Nor are facts alleged that, if true, would establish Beta Pharma's intent in making them.

Fourth, all of the alleged misrepresentations either fail to support Plaintiff's new characterization of his claims or do not establish a claim independent from the contract claims. For example, some are representations about the value of shares in 2011 and

2013—statements that could only have been made after the Agreement was signed in 2010. See, e.g., Comp., Third Count ¶ 11(e)-(f); Supp. Memo. at 11. Accordingly, Plaintiff's own allegations undermine his inducement theory. Others are simply promises that Defendants would perform their obligations under the Agreement, which are necessarily part of any contract and, therefore, barred by the ELD. See, e.g., Comp., Sixth Count ¶ 12(h); Supp. Memo. at 11. And others are the same promises that Plaintiff alleges were made in the Agreement and are the basis for the contract claims. See, e.g., Comp., Third Count ¶ 11(a)-(c); Supp. Memo. at 10.[2]

B. Plaintiff's Nondisclosure Allegations Do Not Insulate His Misrepresentation Claims From the ELD

Plaintiff now argues that the misrepresentation counts allege nondisclosures that were intended to induce him to enter into a business agreement with Beta Pharma. Obj. at 7-8. Defendants explained in the Memorandum in Support that these nondisclosure allegations do not insulate those counts from dismissal under the ELD because Plaintiff failed to plead the facts necessary for a misrepresentation claim based on nondisclosures. Supp. Memo. at 13-16. Specifically, Plaintiff failed to plead facts showing that Defendants had a duty to disclose the information in question, and in some cases, did not plead that Defendants were aware of such information. Id.

In his Objection, Plaintiff summarily claims that he properly pled a claim for nondisclosure because, allegedly, he pled that the parties discussed topics covering the withheld information. He asserts that "defendants undertook to provide plaintiff with information regarding the financial condition of Beta Pharma and Zhejiang Beta Pharma, as well as information regarding ownership of Zhejiang Beta Pharma stock and

[2] Defendants explained this point fully in the Memorandum in Support. Supp. Memo. at 10-13.

the structure and circumstance of any stock transfer." Obj. at 24. These alleged disclosures, in Plaintiff's view, created a duty to provide the supposedly withheld information. This argument is unavailing.

As set forth in the Memorandum in Support, "[l]iability for negligent misrepresentation may be placed on an individual when there has been 'a failure to disclose known facts and, in addition thereto, a request or an occasion or a circumstance which imposes a duty to speak'." *Johnnycake Mountain Associates v. Ochs*, 104 Conn.App. 194, 206 (2007) (quoting *Duksa v. Middletown,* 173 Conn. 124, 127 (1977)). "Such a duty is imposed on a party insofar as he voluntarily makes disclosure," and "[a] party who assumes to speak must make full and fair disclosure as to the matters about which he assumes to speak." *Id.*

Plaintiff's Complaint alleged that Defendants made the following representations:

a) that [Beta Pharma] would pay plaintiff the stated 850,000 RMB yuan per year salary, a portion of which would be paid to plaintiff tax-free in China;
b) that plaintiff would receive about 2% of BP stock;
c) that plaintiff owned 1% of the stock in ZBP;
d) that plaintiff's stock ownership in BP would increase annually;
e) that plaintiff's shares in ZBP were worth $4 million in about 2011;
f) that plaintiff's shares in ZBP were worth about $6 million in 2013;
g) that plaintiff would participate in the ZBP public offering in China;
h) that Zhang, individually, would perform, or cause BP to perform, Zhang and BP's obligations to plaintiff; and

i) that ZBP was going to become a public company in China and that plaintiff would be able to convert his 1% interest in the privately held company ZBP to 1% of the shares of the ZBP initial public offering.

Comp., Third Count ¶ 11(a)-(g); Id., Sixth Count ¶ 12(a)-(i). Under the above, controlling law, if the alleged nondisclosures do not fall into the same categories as these purported representations, then Plaintiff may not premise his misrepresentation claims on those nondisclosures because Plaintiff failed to plead a duty to speak.

First, even a cursory reading of the Complaint reveals that, in those representations, Plaintiff did not plead that Defendants provided information on the financial condition of Beta Pharma or ZJBP.

Second, while Plaintiff pled that Defendants made certain representations about ZJBP stock, he failed to plead that they made representations about the subjects of the alleged nondisclosures, including:

- "material information concerning the financial condition of BP [and ZBP]" (Comp., Third Count ¶ ¶ 13(a)-(b), Sixth Count ¶ 14(a)-(b));
- "material information concerning the transactions and relationship between BP and ZBP" (Comp., Third Count ¶ ¶ 13(c), Sixth Count ¶ 14(c));
- "material information concerning transactions in which BP sold or transferred ZBP shares to others for valuable consideration" (Comp. Third Count ¶ 13(d), Sixth Count ¶ 14(d));
- "BP's knowledge that ZBP would not permit the ZBP shares transferred to plaintiff by BP to be registered in China" (Comp., Third Count ¶ 13(e), Sixth Count ¶ 14(e));

- "BP's knowledge that the ZBP board had ordered BP to repurchase ZBP shares from investors at their current fair market value" (Comp., Third Count, ¶ 13(f), Sixth Count ¶ 14(f));
- "BP's knowledge of the nature and extent of the market it made or was prepared to make for repurchase of ZBP shares so that investors could realize gain on their investments in ZBP" (Comp., Third Count ¶ 13(g), Sixth Count ¶ 14(g));
- "that BP had failed to provide to plaintiff material documentary information concerning BP and ZBP" (Comp., Third Count ¶ 13(h), Sixth Count ¶ 14(h)); and
- "that BP and its controlling officer Zhang had failed to comply with Federal and Connecticut securities laws regulating their ability to sell unregistered securities in Connecticut, including C.G.S. Sec. 36b-4 and 36b-16." (Comp., Third Count, ¶ 13(i), Sixth Count, ¶ 14(i)).

None of the nondisclosures cover the topics of the representations in the Third Count, paragraphs 11(a)-(g). Below is a chart showing the differences between the topics of the alleged representations and the supposed nondisclosures:

Alleged Representations	***Alleged Nondisclosures***
• Salary • 2% BP stock; 1% ZJBP stock • Annual stock increase • Stock value in 2011, 2013 • Participation in public offering • Zhang will perform obligations • ZJBP to become public company in China, conversion of shares	• Info. on relation between BP and ZJBP • Info. on <u>other</u> (non-Plaintiff) transactions • Info. on ZJBP restrictions on share transfers • Info. on ZJBP requiring repurchases • Info. on market for repurchases • Documentary info. on BP/ZJBP • Info. on compliance with securities laws • Info. financial condition of BP/ZJBP

Because the alleged representations and alleged nondisclosures do not concern overlapping topics, Plaintiff failed to plead a duty to speak. The nondisclosure claims must therefore be stricken.

Plaintiff now cites a Superior Court decision as establishing that nondisclosure allegations may defeat the ELD. Obj. at 8-9; Whitney v. J.M. Scott Assocs., Inc., 2014 WL 1647095 (Conn. Super. Ct. Mar. 26, 2014). But that decision concerned a fundamentally different situation. In Whitney, the plaintiff both alleged and proved that he made a request for financial statements, that the defendants provided him with such statements, and that the defendants deliberately omitted an essential fact from the information they gave him. Id. at *21. In other words, the defendants unquestionably did have a duty to disclose. See Supp. Memo. at 14 (explaining the facts necessary to show a duty to disclose). By contrast, as just discussed, Plaintiff failed to plead that Defendants had a duty to disclose. Further, Plaintiff did not allege that he made a request for information to Defendants or that Defendants provided him with any information in response to such a request. For these reasons, Whitney has no application here.

Also, Plaintiff's argument here that the claims are insulated from the ELD by the nondisclosure allegations cannot apply to his claims of negligent misrepresentation. Plaintiff argues that the claims are insulated because "defendant Beta Pharma also failed to disclose significant material information to plaintiff—the withholding of which information was intended to induce plaintiff to enter into a business agreement with Beta Pharma." Obj. at 7 (emphasis added). This assertion is inconsistent with the allegation in the negligent misrepresentation counts that Defendants negligently failed to disclose

the facts at issue. See, e.g., Comp., Third Count ¶ 13. The allegation that the failures to disclose were negligent is necessarily included in the Third and Sixth Counts, because one of the elements of the tort of negligent misrepresentation is the defendant's failure to exercise reasonable care in obtaining or communicating the information. Coppola Constr. Co v. Hoffman Enters. Ltd P'ship, 134 Conn. App. 203, 209 (2012). For the foregoing reasons, the nondisclosure claims must be stricken.

C. The Request for Punitive Damages Fails to Insulate the Fraudulent Misrepresentation Claims from the ELD

Plaintiff's request for punitive damages fails to insulate the fraudulent misrepresentation claims from the ELD.

Plaintiff argues that the ELD does not apply to the fraudulent misrepresentation claims (the Fourth and Seventh Counts) because, in those counts, he seeks punitive damages, which are not available for contract claims. Obj. at 14-15. However, "[p]unitive damages are not a cause of action." SRSNE Site Gp. v. Advanced Coatings Co., 2014 WL 671317, at *2 (D. Conn. Feb. 21, 2014). In the absence of a statutory claim (as here), punitive damages are available only as a remedy for a claim under which the plaintiff pleads and proves a right to recover compensatory or nominal damages. Associated Inv. Co. Ltd. P'ship v. Williams Assocs. IV, 230 Conn. 148, 161 n. 16 (1994). If there is no basis for awarding compensatory or nominal damages for fraud, there cannot be a basis for awarding punitive damages. Accordingly, requesting punitive damages does not create a new claim, independent of the contract-based allegations.

Importantly, if a request for punitive damages insulated a tort claim from the ELD, any plaintiff could evade the ELD by requesting punitive damages. Therefore, Plaintiff's punitive damages theory would eviscerate the ELD.

Courts have repeatedly held that simply claiming punitive damages does not bar application of the ELD. This situation arose in Akl v.Trumbull Ins. Co., 2014 WL 1345257, at *4 (Conn. Super. Ct. Mar. 13, 2014). The plaintiff asserted claims for, inter alia, both breach of the covenant of good faith and fair dealing and "negligent failure to settle," a tort claim. The plaintiff requested punitive damages under both claims.

The Court held that the negligent failure to settle claim was barred by the ELD because it arose from a contractual relationship, and the alleged losses were purely economic. Having struck that claim, the court then struck the request for punitive damages. Id. In short, the plaintiff's claim for punitive damages did not protect the tort claim from the ELD.

A federal Court also applied this rule. Wells Fargo Bank, N.A. v. Fifth Third Bank, 931 F.Supp.2d 834, 842 (S.D. Ohio 2013) ("Fifth Third Bank"). In Fifth Third Bank, "Wells Fargo argue[d] that its gross negligence claim [wa]s not barred by the economic loss rule because it [sought] punitive damages under that claim in addition to actual damages." Id. The Court rejected this argument: "Because Wells Fargo has failed to establish that its breach of contract claim is accompanied by an independent tort, it may not recover punitive damages, and its gross negligence claim is barred by the economic loss rule." Id.

The only authority Plaintiff cites on this issue is Wiygul v. Thomas, 2014 WL 3397720, *7 (Conn. Super. Ct. June 3, 2014). But in Wiygul, the Court held that the

ELD did not apply because the plaintiff claimed, in addition to punitive damages, damages to property and a claim under the Connecticut Unfair Trade Practices Act (CUTPA), so the tort claims were separate from the contract claims. Id. A claim for property damage is not a claim for purely economic losses, and the ELD does not apply to it. See, e.g., Shoreline Care Ltd. P'ship v. Jansen & Rogan Consulting Engineers, P.C., 2002 WL 173155, *2 (Conn. Super. Ct. Jan. 9, 2002). Also, the Connecticut Supreme Court has held that CUTPA claims specifically are not covered by the ELD. Ulbrich v. Groth, 310 Conn. 375, 408-13 (2013). In this action, Plaintiff makes no claims for damage to property, claims independent of the contract-based claims, or claims under CUTPA.

Thus, Plaintiff's request for punitive damages fails to shield his fraud claims from the ELD.

D. The ELD Bars Plaintiff's Claim for Breach of Fiduciary Duty

Defendants have explained that the ELD also bars the Fifth and Eighth Counts, for breach of fiduciary duty, because the alleged conduct and harms in those counts are the same as those pled in the contract counts. Supp. Memo. at 18. Plaintiff now makes the same arguments for insulating these counts from the ELD that he makes about the misrepresentation counts. Obj. at 18-21. Those arguments fail for the reasons explained above and in the Memorandum in Support.

II. Plaintiff Failed to Allege a Cause of Action for Fraud

Defendants explained in the Memorandum in Support that Plaintiff failed to allege the elements of a cause of action for fraud in the Fourth and Seventh Counts. Supp. Memo. at 17-18. Plaintiff now argues that the Complaint alleges the second element

(the statement was untrue and known to be untrue by the party making it) by stating events that "give a strong inference that defendants intended to defraud plaintiff, and/or that defendants demonstrated a reckless disregard for the truth." Obj. at 29 (emphasis added). However, a fraud claim requires that the plaintiff allege facts showing that the defendant knew its statements to be untrue, rather than adopting a "reckless disregard" standard, which amounts to a claim for negligent misrepresentation. Nazami v. Patrons Mut. Ins. Co., 280 Conn. 619, 628 (2006).

Plaintiff argues that his fraud counts are similar to a fraud count upheld by a federal court against a motion to dismiss for failure to state a claim. Walters v. Generation Fin. Mortg., LLC, 2012 WL 1150880 (D. Conn. Apr. 5, 2012). But in Walters, the plaintiff's complaint specifically alleged that the defendant knew its statements to be false, and alleged facts that, taken as true, would certainly establish that the defendant made deliberately false statements to induce him to act in reliance on them. The plaintiff was the sole owner of a mortgage company. The defendant, a competitor, offered to buy the company in return for a five-year employment agreement and a 3.5% interest in the defendant. The defendant told the plaintiff that the 3.5% interest was worth between $3.5 million and $11 million. About two years after the sale, the defendant terminated the plaintiff's employment, claimed the right to redeem his 3.5% interest, and tendered only $350 in payment for it. The plaintiff alleged a plausible motive for the defendant's fraud: eliminating a competitor. The court understandably found that the plaintiff had alleged facts to support a claim of fraud. Id. at *3-4.

The present Complaint is easily distinguished. It alleges that Beta Pharma "knew or should have known" that its statements were false. These factual allegations, taken

as true, fail to establish that Defendants knew their statements to be false. This provides another reason for striking the Fourth and Seventh Counts.

In addition, when arguing against dismissal of the legally meritless fraudulent misrepresentation claims, Plaintiff again improperly creates new facts, which are not in the Complaint. He asserts that "defendants represented to plaintiff that Beta Pharma was better positioned financially than it actually was; [and] that defendants were authorized to provide plaintiff with ZBP stock." Obj. at 29. As can be seen in the Fourth Count, ¶ 11(a)-(g) and Sixth Count ¶ 12(a)-(i), Plaintiff never pled such facts. Accordingly, the Court must disregard these new assertions. In re Nicholas O., 2015 WL 4755470, at *3 n. 9. The fraudulent misrepresentation counts have no basis and must be dismissed.

III. Plaintiff Failed to Allege a Legally Cognizable Fiduciary Relationship to Support His Claim for Breach of Fiduciary Duty

In the Memorandum in Support, Defendants explained that the Fifth and Eighth Counts fail to state claims for breach of fiduciary duty because they do not allege the existence of a legally cognizable fiduciary relationship between Plaintiff and either Defendant. Supp. Memo. at 18-24. Plaintiff now argues that he has alleged four fiduciary relationships. Obj. at 29-35. However, Plaintiff still has failed to show that the Complaint pled a legally cognizable fiduciary relationship.

First, Plaintiff argues that he alleged that Beta Pharma and Zhang were partners with Plaintiff in Beta Pharma Canada (BPC). Obj. at 31. However, as Defendants explained in the Memorandum in Support, partner status gives rise to a fiduciary relationship only if the parties are partners in a formal partnership, i.e., a business entity organized as a partnership under Conn. Gen. Stat. § 34-300, et seq. Supp. Memo. at

19-21. Plaintiff specifically alleged that BPC is a closely held corporation, not a partnership. Comp., Eighth Count ¶ 14(b).[3] Because he does not allege the formation of any other partnership entity between himself and Beta Pharma or Zhang, this argument fails. Plaintiff now argues that a partnership need not be registered to be recognized as an entity that may sue and be sued. Obj. at 31. But Plaintiff's Complaint does not allege that BPC was a partnership, or that any other partnership entity was created, whether by registration or otherwise.

Second, Plaintiff argues that he alleged that Zhang was a fellow officer, director and stockholder in BPC. Obj. at 32. The Memorandum in Support explained that Plaintiff has not made the factual allegations necessary to plead a fiduciary relationship on that basis. Supp. Memo. at 22-23. It is not necessary to repeat that explanation here, except to reiterate that the Eighth Count not only fails to make the necessary factual allegations regarding Zhang's role in BPC or control over it, but fails to allege a single action that Zhang took as a director, officer or shareholder of BPC, alleging only actions that he took as an officer of Beta Pharma.

Third, Plaintiff asserts that Defendants had a "uniquely dominant position over plaintiff given their relationships to ZBP, its stock, and its forthcoming initial public offering." Obj. at 33-34. He explains the "uniquely dominant position" as follows: "[D]efendant Beta Pharma has a substantial ownership interest in ZBP . . . and defendant Zhang was Vice President of ZBP and one of its directors." Obj. at 33. This argument misses the mark, as Connecticut law specifically excludes each of these associations from being characterized as a fiduciary relationship.

[3] The Eighth Count contains three paragraphs numbered 14. The reference here is to the first of these.

Plaintiff argues that Beta Pharma occupied a "dominant position" because it had a substantial ownership interest in ZJBP. Obj. at 33. But under Connecticut law, only a majority shareholder has a fiduciary relationship to other shareholders. Yanow v. Teal Indus., Inc., 178 Conn. 262, 283 (1979). Plaintiff's own Complaint belies this alleged fiduciary relationship, as he pleads that Beta Pharma had only a 45% interest in ZJBP during the relevant period, making Beta Pharma a minority interest holder. Comp., First Count ¶ 7. Furthermore, a shareholder can have a fiduciary duty to another shareholder only for acts that injure the value of the corporation, rather than for acts that harm the private interests of an individual shareholder. Cox v. Reyes-D'Arcy, 2014 WL 4413788, *2 (Conn. Super. Ct. Aug. 13, 2014). Plaintiff did not allege that Beta Pharma took any actions that injured the value of ZJBP.

Plaintiff argues that Zhang occupied a "dominant position" because he "was Vice President of ZBP and one of its directors." Obj. at 33. However, Plaintiff has not alleged the "extraordinary circumstances" necessary to pierce the veil and make a claim for breach of fiduciary duty against an officer or director of ZJBP. Defendants explained this in the Memorandum in Support and incorporate that argument here. See Supp. Memo. at 23-24. The use of the phrase "uniquely dominant position" does not justify ignoring Connecticut case law that limits the set of relationships between a shareholder and other shareholders, officers or directors that may be defined as fiduciary relationships.[4]

[4] This case differs from WEB Mgmt. LLC v. Arrowood Indem. Co., 2008 WL 619310 (D. Conn. Mar. 5, 2008), on which Plaintiff relies, Obj. at 32-33, because WEB did not involve the specific rules that govern the creation of fiduciary relationships between the shareholders, officers and directors of a corporation.

Fourth, Plaintiff argues that he has alleged that Defendants "acted as agents of plaintiff with regard to purchase of ZBP stock and participation in its initial public offering." Obj. at 34. But his Complaint fails to allege any of the elements of a principal-agent relationship. See Supp. Memo. at 24. As Defendants noted in the Memorandum in Support, at no point does Plaintiff: allege that he made any manifestation that Defendants would act for him as his agent, such as an instruction to Defendants to act on his behalf; allege that Defendants ever accepted such an undertaking; or allege any facts to show an understanding between the parties that Plaintiff would be in control of the undertaking. See LeBlanc v. New England Raceway, LLC, 116 Conn. App. 267, 274-75 (2009) (elements of a principal-agent relationship).

Plaintiff now asserts that he alleged that Beta Pharma and Zhang acted as his agents in the Fifth Count ¶ 10, 12, and 13, and the Eighth Count ¶ 10-13 and 15. Obj. at 34. However, none of those paragraphs alleges any of the elements of a principal-agent relationship.

In the Fifth Count, Paragraph 10 incorporates Paragraph 10 of the First Count, which alleges that Beta Pharma entered into the Partnership Agreement with Plaintiff. It alleges no facts related to any of the elements of a principal-agent relationship. In general, a party does not owe a fiduciary duty to a party on the other side of a contractual transaction. Hi-Ho Tower, Inc. v. Com-Tronics, Inc., 255 Conn. 20, 38-43 (2000) (no fiduciary relationship where plaintiff and defendants were "parties to an arm's-length transaction" and defendants had not undertaken to act primarily for plaintiff's benefit).

Paragraph 12 of the Fifth Count alleges that Beta Pharma sold unregistered securities to Plaintiff. Plaintiff has not provided any authority for the idea that a seller of unregistered securities takes on a fiduciary duty to the buyer. Again, parties on opposite sides of a transaction do not owe each other any fiduciary duties. Id.

Paragraph 13 of the Fifth Count alleges a series of breaches of fiduciary duty on the part of Beta Pharma. It makes no allegations about a manifestation by either party of an intent that Beta Pharma would become Plaintiff's agent. It does allege that Beta Pharma made promises to Plaintiff, but they are not promises to act on Plaintiff's behalf under Plaintiff's control.

Paragraph 10 of the Eighth Count incorporates Paragraph 10 of the Second Count, which alleges that Zhang exercised dominion and control over the affairs of Beta Pharma. It makes no allegations about the relationship between Plaintiff and either Defendant .

Paragraph 11 of the Eighth Count incorporates Paragraph 11 of the Second Count, which alleges that Zhang entered into the Partnership Agreement with Plaintiff. Again, the fact that two parties entered into a contract does not make one party the agent for the other party.

Paragraph 12 of the Eighth Count incorporates Paragraph 12 of the Second Count, which alleges that Zhang entered into a partnership with Plaintiff and they created BPC, a corporation. As noted above, Plaintiff does not allege the creation of a formal partnership, i.e., a business entity. The Complaint does not assert that the informal partnership included any manifestation from either party that Defendants would act as Plaintiff's agents.

Paragraph 13 of the Eighth Count incorporates Paragraph 13 of the Second Count, which alleges that Zhang assumed responsibility for causing Beta Pharma and himself to perform their obligations under the Agreement. As noted above, contractual responsibilities do not necessarily create a fiduciary relationship. Plaintiff did not allege in this paragraph that either party manifested an intent to create a principal-agent relationship, or an intent that Plaintiff would be in control of the undertaking.

The Eighth Count does not contain a Paragraph 15. If Plaintiff is referring to the second paragraph numbered 14, that paragraph alleges that Zhang breached fiduciary duties to Plaintiff. It does not allege any of the elements of a principal-agent relationship.

Plaintiff claims that a federal court's decision supports his argument that the parties had a principal-agent relationship. Metro. Enter. Corp. v. United Techs. Int'l Corp., 2004 WL 1497545, at *8 (D. Conn. June 28, 2004). In that case, however, unlike in the present matter, the complaint alleged at least two of the elements of a principal-agent relationship. It alleged that, in a contract signed by both parties, the agent agreed to represent the principal and took on responsibilities to the principal consistent with agency. Id.

In addition, the court in Metropolitan Enterprise explicitly rested its decision on the notice pleading requirement under Rule 8 of the Federal Rules of Civil Procedure, which requires less than the fact pleading standard for complaints filed in state court in Connecticut. Id. See, e.g., Boutvis v. Risk Mgmt. Alternatives, Inc., 2002 WL 971666, at *1 n. 2 (D. Conn. May 3, 2002) (finding that complaint met the pleading standard in part because the relevant standard was the federal notice pleading standard rather than

the fact pleading standard in Connecticut state court); Edible Arrangements, Inc. v. Brenner, 2009 WL 1578509, at *1 (Conn. Super. Ct. May 14, 2009) ("The court has no doubt that the plaintiff's complaint would pass muster in federal court which only requires notice pleading . . . However, we are a fact pleading not a notice pleading state.").

Plaintiff also asserts that some employer-employee relationships create a fiduciary duty. Obj. at 35 n. 10. However, not all employer-employee relationships create a fiduciary duty. See, e.g., Hoffnagle v. Henderson, 2003 WL 21150539, at *6 (Conn. Super. Ct. Apr. 17, 2003). Plaintiff provides no reason why any employer-employee relationship that the Agreement might have created would be among those that create a fiduciary duty. In addition, the Complaint does not plead that an employer-employee relationship is the basis for the alleged fiduciary duties. Comp., Fifth Count ¶ 11-12, Eighth Count ¶ 14.

The absence of an allegation of a legally cognizable fiduciary relationship provides an additional reason for striking the Fifth and Eighth Counts from the Complaint.

IV. Conclusion

For all the foregoing reasons, and for the reasons explained in Defendants' Memorandum in Support , Defendants respectfully request that the Court strike the Third through Eighth Counts from Plaintiff's Complaint.

DEFENDANTS BETA PHARMA, INC. AND DON ZHANG,

By: /s/

Michael G. Caldwell (Indiv. juris no. 421880)
LeClairRyan, A Professional Corporation
545 Long Wharf Drive, Ninth Floor
New Haven, Connecticut 06511
Firm juris no. 428872
Telephone: (203) 672-1636
Facsimile: (203) 672-1656
Email michael.caldwell@leclairryan.com

Jack L. Kolpen (NJ Bar No. 026411987)
Benjamin R. Kurtis (NJ Bar No. 029492010)
Fox Rothschild, LLP
Princeton Pike Corporate Center
997 Lenox Dr., Bldg. 3
Lawrenceville, New Jersey 08648-2311
Telephone: (609) 895-3304
Facsimile: (609) 896-1469
Email: JKolpen@foxrothschild.com
Email: BKurtis@foxrothschild.com

Glenn A. Duhl (Indiv. juris no. 306567)
Siegel, O'Connor, O'Donnell & Beck, P.C.
150 Trumbull Street
Hartford, Connecticut 06103
Firm juris no. 057730
Telephone: (860) 280-1215
Facsimile: (860) 527-5131
Email: gduhl@siegeloconnor.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following counsel of record by email this 17th day of December, 2015.

Jonathan Katz, Esq.
Jacobs & Dow, LLC
350 Orange Street
New Haven, CT 06511
jkatz@jacobslaw.com

/s/
Michael G. Caldwell (Indiv. juris no. 421880)